

## Private Law Case Law Update

**Charlotte Thomas**

**May 2025**

**Mr K & Anor v Mr Z & Anor [2025] EWHC 927 (Fam)**

Full judgment can be found [here](#)

### Introduction

Mrs Justice Gwynneth Knowles hands down judgment on an application made to the Court to make a parental order in respect of a 14-month-old boy (B).

Where the applicants were both in their 70s, the Court held that their age had a direct impact on B's welfare and therefore the Court should examine what arrangements had been made to secure the child's welfare should one or both of his now parents die.

This judgment was published due to the important welfare issues involved in the application. It offers some welcome advice to those who may engage in any surrogacy arrangement.

### Factual Introduction [1]-[4]

Mr and Mrs K made an application in July 2024 to the court, inviting them to make a parental order in respect of a little boy called B, who was born in January 2024. The important facts are that B was born in the United States of America following a gestational carrier agreement. The embryo was created using Mr K's sperm and a donor egg. Mrs Z was the gestational surrogate and therefore is, alongside her husband the respondent to the proceedings. Both Mr and Mrs Z have consented to the making of a parental order and have played no active role in the legal proceedings.

Although the Judge made the parents aware that a parental order would be granted in the previous hearing, this judgment was reported as it raised important welfare issues and offers some advice for those who may engage in a foreign or other surrogacy arrangement.

Important to the welfare issues in the case, was the fact that both Mr and Mrs K were aged 72 years old and were retired. The Judge makes reference to the fact that when B goes to school both will be 76 years old and will both be 89 years old when B reaches his majority. The Judge frankly states that the parties have begun parenting at a time in their lives where, 'it is foreseeable that their health will decline and that one or both of them will become seriously incapacitated or die before B reaches his majority' [Paragraph 3].

It is explained that this will have a direct impact on B's welfare immediately and in the not-so-distant future. As a result of parties' ages, the Court would have to carefully examine what arrangements have been made to secure B's welfare if either of the parties should become incapacitated or die.

## **Background [5]- [12]**

Both applicants were retired and married for over 35 years. They experienced difficulties in trying to have a family but their first son, A, was born in 1993, after several rounds of IVF treatment. Their son tragically died in 2020, and after hearing stories of other parents finding solace in having other children, they both decided to start their surrogacy journey. Both Mr and Mrs K were adamant that this journey was not an attempt to replace A or manage their grief at his loss.

By way of a brief summary of their journey, they had found a Californian surrogacy service in 2021, identified a suitable egg donor by autumn 2022, and had matched with Mrs Z as their surrogate in 2023. Once Mrs Z became pregnant Mr and Mrs K maintained WhatsApp contact with her throughout her pregnancy and attended all medical appointments remotely. In December 2023, as is customary in California surrogacy arrangements, they obtained a pre-birth order which conferred on Mr and Mrs K exclusive parental and legal status and excluded any rights Mr and Mrs Z would have. Mr and Mrs K rented a property in California this meaning they were there when B was born a month early than expected. B was discharged from the hospital into Mr and Mrs Z's care a day after his birth.

After his birth, Mr and Mrs K spent almost 2 months living in their rented property and cared for B with the assistance of a maternity nurse. Then returned to the UK in March 2024 and B is reported to be developing well and Mr and Mrs K care for him with the assistance of a nanny who comes to the family home 5 days a week. The Parental Order Reporter observed B having a loving bond with Mr and Mrs K.

Mr and Mrs K asked Mr and Mrs Q to be the guardians of B, in the event of their deaths or incapacity, which they agreed. Mr and Mrs Q are a couple in their early thirties who were friends with A. As well as this, Mrs K's niece, P, has also agreed to become a guardian for B if Mr and Mrs Q were unable to act in that capacity.

## **Procedural history [13]-[14]**

The application for a parental order was made in July 2024, subject to a standard case management direction on 5th November 2024. Prior to the next arranged hearing the parental order reported recommended that B be made subject of a parental order in favour of Mr and Mrs K. This matter came before Mrs Justice Gwynneth Knowles on 28th February 2025 in which counsel had acknowledged that Mr and Mrs K could satisfy the criteria under s. 54 of the Human Fertilisation and Embryology Act 2008 ("the HFEA 2008") but stated that the Court should examine the welfare limb of the application with care.

The Judge stated that as the Court was obliged to have regard to the child's lifelong welfare pursuant to s.1 of the Adoption and Children Act 2002 ("ACA 2002"), she gave further directions aimed at determining what the arrangements for B's care were if either or both Mr and Mrs K became incapacitated or died. At the same time, in order to grant Mr and Mrs K parental responsibility, she made a 'lives with child' arrangements order. She explained she did this as there was no one in this jurisdiction who had parental responsibility for B.

## **The legal framework for Parental Orders [15]-[19]**

The Judge explained that in this legal jurisdiction (even with the Californian parental order), Mr and Mrs Z were B's legal parents and Mr and Mrs K had no legal status in relation to B. She explained that should a parental order be made, Mr and Mrs Z's legal relationship would extinguish, and a lifelong parental relationship would be created between B and Mr and Mrs K.

The full framework is set out at paragraph [16] of the judgment but by way of a brief overview, an application for a parental order made by two applicants is governed by s. 54 of the HFEA 2008. This section establishes that a parental order in respect of a child born through surrogacy should be made where such an order meets the child's welfare needs in accordance with s. 1 of ACA 2002 and one of the criteria in s54 are satisfied.

Finally, the Courts paramount consideration must be to the child's welfare throughout his life (s1(2)). Her honour also references Sir James Munby's comments in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 which establishes that a parental order, 'has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences...'

## **Submissions [20]-[23]**

The Judge details the submissions that were made on behalf of Mr and Mrs K in regard to welfare. Attention was drawn to the positive observations of the parental order reporter who describes B as a 'cherished child' whose needs were being met by Mr and Mrs K. The Court also had sight of statements which described the arrangements for B, should either Mr or Mrs K become incapacitated or die. The arrangements were that Mr and Mrs Q would only take over B's care should both of them die as if one of them died the other would continue to care for B, be assisted by a nanny and B would attend boarding school. There was a discretionary trust with B being the beneficiary in the Wills of both Mr and Mrs K. Both agreed that a special guardianship order would be the most appropriate order in the event that either or both of them were unable to care for B.

It was submitted on behalf of Mr and Mrs K that these arrangements should be placed in recitals of any parental order, to allow them to annex it to any future application for special guardianship or child arrangements order. It was submitted that these arrangements were a comprehensive plan which would be kept under review as B got older and his needs changed. It was stated that the absence of this parental order would leave Mr and Mrs Z as B's legal parents in circumstances where they were in a different jurisdiction and had no desire to exercise parental responsibility for B.

## **Decision [24]- [37]**

The Judge explained that Mr and Mrs K satisfy the criteria in s54 as B was carried by Mrs Z and Mr K's sperm was used, both Mr and Mrs K are married, and over the age of 18. Both have domicile of origin in this jurisdiction and B has had his home with them when the application was made, which was within 6 months of B's birth. Finally, Mr and Mrs Z had consented to the making of a parental order.

In regard to the payments Mr and Mrs K made to Mr and Mrs Z, the total amounted to £151,059.68 of which £24,635.59 were reasonably incurred. The remaining sums required the Court's authorisation, but Her Honour considered these to be lawful as they were in accordance with the surrogacy agreement entered into with a reputable surrogacy agency. It was held that there had been no abuse

of public policy with respect of the £61,254 given to the surrogate, as within the Californian context these were 'not so great as to distort her agency within not only the surrogacy proceedings but also within these legal proceedings' [25]. As B's welfare was paramount and overrode these matters, the payments made were authorised.

With regard to the decision on welfare, the Judge explained that it was clear B was a much-loved little boy who was developing well and had a good relationship with his intended parents. She accepted that Mr and Mrs K understood the importance of B understanding how he came to be born and also needed to know about his brother, A. In respect of that matter, Mr and Mrs K will consider taking advice from a child psychologist.

Both Mr and Mrs K recognise the importance and benefits of B retaining a good relationship with Mr and Mrs Z and they continue to have good contact with them and plan to return to the USA so B can meet them when he is older. The Judge stated that this satisfied the criteria in s.1(4) of ACA 2002 but that they must be seen through the view of B's welfare throughout his life. She drew attention again to the reality of what is likely to happen to B as a child of very elderly parents, which is the experience of loss and grief. This loss, the Judge explained, may happen at a time in B's Childhood, where he is unprepared to deal with it, and may be placed of the care of adults who he is not emotionally close with. Although she stated that 'It is not the purpose of this judgment to moralise about the wisdom of having a baby through surrogacy at an advanced age' she stated the Court can and should ensure that the child's future arrangements have been thought about and planned should the worst happen.

The Judge explained that despite all of the area in which they had planned their surrogacy journey, Mr and Mrs K had not given the same attention to B's care in the event of their death before what may have been the final hearing. Although the Judge accepted that Mr and Mrs K likely had the intention of resolving matters in the way they did by the final hearing, given their ages these should have been addressed some time ago.

The Judge stated that the planned arrangements for B's care were appropriate and placed his welfare needs first in the short, medium and long term. She stated that the proposed special guardianship order was sensible as it preserves B's legal relationship with his parents both emotionally and psychologically and maintained B's entitlement to the financial benefits of the trust created for him by Mr and Mrs K.

Due to all of these factors, the Judge was therefore in favour of granting the parental order as it was in B's welfare interest to do so. The Judge was invited to add to the list of key issues endorsed in Re Z by Theis J, which were key issues that any person considering embarking on a surrogacy arrangement should consider before they enter their arrangement. The Judge added issues to the already extensive list outlined in Re Z, that individuals considering surrogacy should have in mind before undertaking the arrangement. She added:

- a) what steps have been taken by the intended parents in relation to estate planning (before and after a parental order is made) in respect of the child's future welfare;
- b) what steps have been taken by the intended parents in respect of future care and financial arrangements for the child in the event of the incapacity of one (or both) of the intended parents;

- c) what steps have been taken in respect of future care and financial arrangements for the child in the event of the death of one (or both) of the intended parents.

She stated that the importance of these particular issues will vary from case to case but will be of greater importance for single applicants and for applicants of advanced years. The Judge then set out the updated issues as originally stated in Re Z at paragraph [37] which are not outlined here but are an essential read for any practitioner dealing with applications for parental orders.

## **Conclusion**

This case shows the importance of the welfare stage in deciding whether a parental order should be granted under s54 HFEA 2008. The Judge added issues to the already extensive list outlined in Re Z, that individuals considering surrogacy should have in mind before undertaking the arrangement.

Although the Judge made no conclusions on the wisdom of having a baby through surrogacy at an advanced age, she highlighted that in these circumstances a Court should ensure that the future arrangements for a child in this situation, were thought about and planned in case the worst should happen. This future planning should be done as early as possible in the proceedings.



**Charlotte Thomas**

E: [charlotte.thomas@stmarysfamily.co.uk](mailto:charlotte.thomas@stmarysfamily.co.uk)

T: 0115 950 3503